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No. - .

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

PETER S. CARBONE, CHAIRMAN, GENERAL ADJUSTMENT COMMITTEE, AND UNITED TRANSPORTATION UNION,
PETITIONERS,

v.

ROBERT W. MESERVE AND BENJAMIN H. LACEY,
TRUSTEES OF BOSTON & MAINE CORPORATION,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Questions Presented.

1. Whether a railroad may change an actual, objective working condition relating to the issuance of job information and circumvent the procedures prescribed by 45 U.S.C. § 156 for the settlement of a major dispute by frivolously claiming its action constituted a "minor" dispute because it was "arguably" warranted by a provision in the contract that related to the transfer of crew dispatchers.

2. Whether a railroad's change in submitting information on the availability of extra work for spare board members by substituting an inadequate reproduction of a spare board by a telecopying device known as "Rapid fax" in place of a reliable up-to-date spare board was a unilateral change of conditions which entitled the Union to the issuance of an injunction.

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§§ 151-163 ("Railway Labor Act") 1, 5, 6, 14

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The petitioners, Peter S. Carbone and United Transportation Union, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on April 10, 1981.

Opinions Below.

The opinion of the Court of Appeals, not yet reported, appears in the Appendix A hereto together with that of the District Court for the District of Massachusetts in Appendix B, which was reversed by the First Circuit.

Jurisdiction.

The judgment of the Court of Appeals for the First Circuit was entered on April 10, 1981. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions Involved.

Sections 152 Seventh and 156 of the "Railway Labor Act," are reproduced in Appendix C attached hereto.

Statement of the Case.

Mechanicville, New York was the location of one of the railroad terminals or yards maintained by the defendants (Rail-

road) for many years and out of which the members of the United Transportation Union (Union) worked and were assigned to duty.

Prior to April 6, 1979, the Railroad had assigned one crew dispatcher per shift to Mechanicville to service a "spare board" which listed the job vacancies for extra work and irregular assignments for the Union members operating out of Mechanicville.

The men could check the board several times daily and confer with its dispatcher to determine the availability of extra work — flaggers, yard helpers, trainmen and other positions.

The crew dispatchers maintained job information data on the Mechanicville board up to date at all times. The "spare board" was a large piece of paper on which the dispatcher wrote in by hand the shift, train, and job description of each spare job and the name of the employee filling it. After an opening became available, the employee first in line on the spare board was called for work by the crew dispatcher, but if another employee with more seniority was aware of the notation, he could insist upon the appointment. Another terminal with a similar crew-dispatching facility was located in East Deerfield, Massachusetts, 100 miles away.

An agreement between the Union and the Railroad was reached in settlement of a major dispute before the National Mediation Board, Case No. E-172, on February 11, 1959, concerning the maintenance of crew dispatchers at particular work locations. The agreement, identified as Item 21, provided:

> Item 21. In disposition of this item, it is understood crew dispatchers will not be withdrawn from any terminal where employed as of the date of this letter without consultation in advance with the General Chairman. This will not apply to changes in or discontinuance of individual assignments.

Eleven years later, by a letter dated November 24, 1970, the Union and Railroad agreed to a change in Item 21 as follows:

> This refers to the settlement of Item 21 in National Mediation Board Case No. E-172.
>
> For the future it is understood crew dispatching facilities will not be further merged without prior approval from this Committee, with the exception of the crew dispatching facilities at Ribgy and Westboro, which can be merged at the Carrier's option with the present crew dispatching facilities at Mystic Junction.
>
> In other words, the crew dispatching facilities on the Boston & Maine property would remain as separate facilities, as follows:
>
> Mechanicville
> East Deerfield
> Passenger Crew Dispatchers at Boston
> Mystic Junction Crew Dispatchers.

Another relevant document in this case was a letter dated October 3, 1978, from the Railroad to the Union, placing the subject of consolidating crew-dispatching facilities in mediation and which read:

> Please consider this letter as the usual and customary thirty (30) day notice under Section 6 of the Railway Labor Act, as amended, of the Carrier's desire to change agreements affecting rates of pay, rules, and working conditions to the extent indicated in Attachments "A", "B" and "C" hereto.

Accompanying the above letter of October 3, 1978, was a series of attachments including A-11 which read as follows:

UTU attachment A-11
Establish a rule to provide for:
Eliminating any rule or agreement which imposes any restriction on consolidating of crew dispatching facilities.

On April 6, 1980, the Railroad arbitrarily changed working conditions at Mechanicville, New York by withdrawing the dispatching crew, and effectively abolished this dispatching facility, forcing the Union personnel to seek information for spare board assignments at East Deerfield, Massachusetts.

After April 6, 1979, the railroad substituted a telecopying machine known as "Rapid fax" which reproduced a spare board maintained in East Deerfield and forwarded to Mechanicville. The Mechanicville spare board members who lived in the vicinity could check the telecopy and the Railroad also provided three toll-free WATS lines allowing employees to call free from their homes to East Deerfield. The spare board members found the substituted facility inadequate as compared to the former spare board.

Although the "Rapid fax" machine was scheduled to reflect job openings three times a day, copies were often late in arriving, undecipherable and difficult to analyze. Without the presence of a crew dispatcher who entered the notation on the spare board, it was difficult to comprehend it, and the Railroad was advised of these deficiencies.

In addition, the WATS lines were generally undependable and the men found that they were unable to protect their rights and gain the extra compensation which they formerly received.

The Railroad withdrew the merger proposal, attachment A-11, from the Mediation Board on August 27, 1979. The Union was not told of the withdrawal until advised by a Mediator on September 25, 1979. The next day, UTU Local 470

Union members voted favorably for a strike. On November 30, 1979, the Union sought an injunction against the Railroad for implementing and proceeding with the withdrawal of the dispatchers on April 6, 1979, merging the Mechanicville facility with East Deerfield, and replacing the spare board with the telecopying machine and WATS lines. The District Court issued an order of a preliminary injunction. It found, after two hearings, February 29, 1980 and March 5, 1980, that a major dispute existed and that the Railroad had changed the rules and working conditions of its employees as embodied in an agreement dated November 24, 1970, without resort to available procedures mandated by 45 U.S.C. § 156. The First Circuit Court of Appeals, by decision entered April 10, 1981, found: that the dispute was "minor" not "major"; and that there may have been a violation of the contract but that the dispute was a question of contract interpretation and outside the Court's jurisdiction. The District Court's award of an injunction was reversed and remanded for vacation of the injunction.

Reasons for Granting the Writ.

I. The First Circuit's Decision Conflicts with a Decision of the Sixth Circuit Court of Appeals as to the Proper Interpretation of 45 U.S.C. § 156.

The principal issue is whether the dispute between the parties was "major" or "minor" under the Railway Labor Act, 45 U.S.C. §§ 151-163 (see Appendix C). The statute does not use the words which are used to distinguish mutually exclusive procedures mandated for resolving two different kinds of disputes. The Court in *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S.

711 (1945), described and explained the distinction between major and minor disputes. The Courts stated that the major disputes relate to disputes over the formation of collective agreements or efforts to secure them, and that they look to the acquisition of rights for the future, not to assertion of rights claimed to have been vested in the past. With reference to the minor dispute, it said it contemplated the existence of a collective agreement already concluded, or the interpretation and application of an existing one, and that these disputes relate either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case.

Disputes involving contract interpretation are to be handled under 45 U.S.C. § 153, which provides that either party may submit the dispute to the appropriate Adjustment Board for a final and binding decision of the meaning of the contract. A strike over disputes properly submitted to the Adjustment Board may be enjoined in order to protect the Board's jurisdiction. *Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30 (1957).

The Railway Labor Act provides a mandatory program invoking the services of the National Mediation Board to facilitate voluntary settlement of major disputes which was described by the Supreme Court in *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 378 (1969).

The Union contended in this case, and the District Court found, that the Railroad's action in substituting a new method of formulating extra work information for union workers, which was a reproduction of a spare board by a telecopier and WATS lines in place of a spare board at Mechanicville, was a unilateral action without any basis in the contract. The Railroad asserted that its action was justified based on the 1959 agreement. The First Circuit held that if it is ever "arguable" that the 1959 agreement was applicable, then it was a minor

dispute, citing *REA Express, Inc.* v. *Brotherhood of Railway, Airline, Etc.*, 459 F.2d 226 (5th Cir.), *cert. denied*, 409 U.S. 892 (1972) and *Airlines Stewards & S. Ass'n* v. *Caribbean Atl. A. Inc.*, 412 F.2d 289 (1st Cir. 1969).

In deciding that the dispute was minor, thereby upholding the contention of the Railroad, the First Circuit found that it was "arguable" that the Railroad had authority in the 1959 agreement even if the 1959 agreement spoke in terms of "crew dispatchers" (Appendix A, p. 6a).

The First Circuit further stated (Appendix A, pp. 6a-7a):

> We think it at least arguable that the 1970 substitution of "facilities" for "dispatchers" was a liberalization in return for the union's receiving a right of approval rather than, as under the 1959 agreement, of consultation, only, prior to any merger. Furthermore, the record indicates that the union's real concern was ready ("facile") access to information, and not the physical location of the individuals who generated it.

In view of the above, it may be that the First Circuit misconceived the question to be one of an argument over the withdrawal of crew dispatchers from Mechanicville rather than what it admitted the record to indicate, the Union's concern over ready access to job information for spare board members. There is no language in the several documents cited in the record, Item 21 of February 11, 1959, the letter of November 24, 1970, or the § 6 notice of October 3, 1978 that dealt with the underlying dispute of accurate and up-to-date extra job data. In concluding that the Railroad "arguably" was empowered by the 1959 agreement to withdraw dispatchers on April 6, 1979, it failed to find any language using the terms "spare board," "telecopier," "telefax," "WATS Line" or other words relating to furnishing job information.

This case is nearly identical to the Penn Central case in the 6th Circuit upholding a lower court finding of a "major" dispute and the issuance of an injunction against the Railroad which unilaterally changed from "crew boards" to the issuance of "print outs," the means of advising Railroad employees of their work schedules. *United Transport. Union, L. 63E* v. *Penn Central Co.*, 443 F.2d 131 (6th Cir.), *cert. denied*, 404 U.S. 938 (1971).

The "crew boards" in the Penn Central case, consisting of a large peg board and colored pegs as a means of keeping employees advised of the present and upcoming work schedule, were comparable to the spare board in this case.

The change in the mode of transmitting work schedule information was described by the 6th Circuit in part as follows:

> These board served to inform workers at a brief glance when they would be called for work, what their order was, what openings were available and when. The company decided to alter this operation and move it to a central office (six miles away and not accessible to employees). There employing a board of a very similar nature (but employing colored cards in place of pegs) a scheduler would plot any crew changes and feed the information into a computer. The company then posted "print outs" drawn from the computer three times a day. The print outs are typewritten 8" x 14" pieces of paper. Usually six or eight pages were posted at one time.

443 F.2d at 133.

The 6th Circuit further found certain matters of background which bore heavily on the determination of the dispute — that the union members never relied exclusively upon the crew boards for information but were accustomed to calling

the dispatchers; that the print outs were often invalid and inaccurate as a source of information at the exact moment of posting; and that the posting of the printouts three times a day was not equivalent to the maintenance of the crew board. 443 F.2d at 135.

The actual, objective working condition, that of receipt of job data, was not referred to in the 1959 agreement although it could be a factor and bear on the determination of the dispute.

Since the contract is silent with respect to the existence of a spare board or the Rapid fax or any other means of communicating spare board information to the members who used it for work assignments, the Railroad therefore cannot claim that its actions were "arguably" warranted by the contract, and therefore the First Circuit erred in finding that the Railroad's contractual defense based on the 1959 agreement was not insubstantial or frivolous.

Assuming that the Railroad claims that if it could remove crew dispatchers from Mechanicville under the 1959 provision, its obligation to continue to provide the same up-to-date and accurate job information to spare board members continued. Inasmuch as different conclusions developed between the First and Sixth Circuits from similar circumstances, the conflict justifies the grant of certiorari.

II. The Decision below is Not Supported by the Airline Stewards Case in the First Circuit and Cases in Other Jurisdictions.

In reaching its decision in the case below, the First Circuit relied on several cases in other circuits that found the disputes to be minor with those courts, after review determined that the railroad contractual defenses were not frivolous. The Union argues that those cases are not applicable to this case.

The main distinction is that the First Circuit is relying upon a 1959 agreement which does not encompass language which dealt with the means of informing the Union members of the availability of work on the spare board. The First Circuit relied upon *Airlines Stewards & S. Ass'n* v. *Caribbean Atl. A. Inc.*, 412 F.2d 289 (1st Cir. 1969). That case involved the interpretation of the Flight Stewardesses Scheduling Policy Manual which included a provision (par. 4.G.) that related to the acceptance of assignments for open time flights. Prior to September 9, 1968, the open time airline flights were offered to stewardesses on an individual basis and the change was made by the airline to require the stewardesses to take all flights or none at all. 412 F.2d at 290.

Paragraph 4.G. contained details relative to "open time" flights, requiring an interpretation, but in the case at bar there is no similar covenant or provision that relates to the making of job information available to the spare board members.

The First Circuit also cited *REA Express, Inc.* v. *Brotherhood of Railway, Airline, Etc.*, 459 F.2d 226 (5th Cir.), *cert. denied*, 409 U.S. 892 (1972). In that case, the 5th Circuit found that the changes that were introduced by the Railroad in its trucking operations included changes in pay basis, hours of service, layovers, domicile and seniority rights, which were covered by provisions in existing bargaining agreements. It was provided in part in the agreement that "special provisions [will] be established governing hours of service, overtime, and basis of pay of over-the-road truck runs." 459 F.2d at 227. No comparable language appears in the agreement at issue here.

In the case of *United Transp. U. Gen. Com. of Adj. (Prop. of P. C. Co.)* v. *Baker*, 499 F.2d 727 (7th Cir.), *cert. denied*, 419 U.S. 839 (1974) (Appendix A, p. 7a), the 7th Circuit held that the Railroad's substitution print outs for the prior system of crew calling was in compliance with the parties' collective bargaining

agreement and gave rise to a "minor" dispute. 499 F.2d at 729. Section 8-B-1 of that agreement provided that "[c]rew boards showing the order in which the crews are to go out shall be maintained." 499 F.2d at 730. The Railroad replaced the crew board in book form with print out sheets and the union objected. In contrast, the First Circuit did not interpret a similar provision mandating the maintenance of a communications system or "spare boards" at Mechanicville, but only the 1959 provision relating to the withdrawal of crew dispatchers. Accordingly, the Union contended that the reference to the *Baker* case does not support the First Circuit judgment in this case.

An 8th Circuit case cited by the First Circuit (Appendix A, p. 5a), *United Transportation U.* v. *Burlington Northern, Inc.*, 458 F.2d 354 (8th Cir. 1972), brought up the question whether the Railroad could alter assignments for firemen assigned to diesel engines to allow use of firemen only on runs and schedules in order to comply with Wisconsin law. The Court found the issue was a "minor" dispute as the provision was susceptible to the interpretation sought by both. The Court noted that the parties were disputing covenants contained in Arbitration Board Award No. 282 64-1 Arb., which dealt with the subject of the termination of the services of firemen with severance pay. 458 F.2d at 355.

Rutland Railway Corp. v. *Brotherhood of Locomotive Eng.*, 307 F.2d 21 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963) involved a disagreement over the rescheduling of trains without renegotiating them with the union. The Court, in finding the dispute was "minor" and that it arose out of a difference in interpretation of the contract, referred to provisions that supported the Railroad's contention. One provision, Article 39(e) of the agreement with the Order of Railway Conductors and the Brotherhood of Railroad Trainmen, referred to the posting of new and vacant runs on the division and the

assignment of these runs to bidders. Another such provision was language in Article XXXVII (a) in the Railroad's agreement with the Brotherhood of Locomotive Engineers, essentially the same as the provisions above and Article 39(e) with the Conductors and Trainmen, which referred and related to the establishment and bulletining of new runs. 307 F.2d at 35. There are no such provisions in this case dealing with the change over from a spare board to the telecopying system and WATS lines.

United Trans. Un. v. *Penn Central Trans. Co.*, 505 F.2d 542, 544 (3d Cir. 1974), held that the Railroad's position that the existing contract sanctioned a disputed change was not obviously insubstantial. The change that was effected by the Railroad was the elimination of certain work assignments for its employees which would make overtime work the norm rather than the exception for the workers. 505 F.2d at 543.

In concluding that the disputed action of the Railroad can "arguably" be justified by the existing agreement, the Court quoted several provisions of the national agreement which were set out in Note 4, page 544. For example, among other rules, the Court quoted Rule 8(3) in referring to the payment of employees working more than five straight time eight-hour shifts and Rule 5L-1 relating to eight hours of work for yard trainmen.

Another Circuit Court decision which concluded the disagreement between the parties led to a "minor" dispute was *Local 1477 United Transportation Union* v. *Baker*, 482 F.2d 228 (6th Cir. 1973), that dealt with the power of the Railroad to discipline employees who absented themselves from work frequently. The Court found that the document did not unambiguously answer the disputed question, and held the dispute to be "minor."

It noted that the Railroad referred to several rules regulating the privilege of lay-off as long as a qualified replacement is

available, that the work time it agreed to provide is inferentially the normal work week, and that the rules require "faithful discharge of duty" and prohibit absences from duty "without proper authority". It rules that the inferences to be drawn from the documents and past practice "are 'arguable' and cannot fairly be characterized as clearly unreasonable or 'obviously insubstantial'". 482 F.2d at 231.

The Union contends in the case at bar that the First Circuit's decision raises a significant and recurring controversy concerning the right of the Union to seek relief under 45 U.S.C. § 156. It is maintained that the First Circuit's reasoning is difficult to reconcile with that of the Sixth Circuit in the *Penn Central* case on the similar facts.

The Union also urges that the Railroad's attempt to seek to avoid terming the dispute "major" because its defense is based on its interpretation of the 1959 provision in the contract should be allowed only if there is a reference in such a provision to the issue (the furnishing of spare board data to Union members), and it is asserted that the absence of such a reference raises a doubt as to the validity of its defense. These conflicts justify the grant of certiorari to review the judgment of the First Circuit.

III. The Court should Grant Certiorari to Determine the Question of Whether the Union is Entitled to the Issuance of an Injunction Ordering the Railroad to Maintain the Status Quo as of April 6, 1979.

The Union is entitled to the issuance of an injunction to maintain as the status quo the actual, objective working conditions relating to the means of making job opportunities data and information available to spare board members, out of which the dispute arose, irrespective of whether these condi-

tions are covered in an existing collective agreement. *Detroit & Toledo Shore L. R. Co.* v. *Brotherhood of Loc. F. & E.*, 267 F.Supp. 572 (N.D. Ohio 1967), *aff'd*, 401 F.2d 368 (6th Cir. 1968), *aff'd*, 396 U.S. 142 (1969).

The Union contends it is also entitled to the issuance of an injunction for another reason. The Railroad violated the terms of § 156 that provide that in every case where a § 6 notice of an intended change has been given, or conferences held, or the services of the Mediation Board requested, working conditions shall not be altered by the Carrier until the controversy has been acted upon as required by § 155 by the Mediation Board.

By letter dated October 6, 1978, the Railroad placed in mediation the item relating to the establishment of a rule to eliminate any restriction on the consolidation of crew dispatching facilities. The Union contends that the Railroad clearly violated § 156 by unilateral and arbitrary action on April 6, 1979 changing an actual, objective working condition while mediation was in progress. The status quo is to be maintained pursuant to § 156 of 45 U.S.C., while the procedures of the Railway Labor Act are being exhausted. Assuming there is a "minor" dispute over the question of interpretation of the 1959 agreement referring to withdrawal of crew dispatchers, the Union says that the status quo prior to April 6, 1979 may be maintained by the issuance of an injunction against the Railroad until adjustment under 45 U.S.C. § 153 and other processes shall have been completed.

The Union's losses were likewise made evident in the case at bar. Evidence was given and the District Court judge found that the members of the Union whose names were listed on the spare board at Mechanicville were unable, after April 6, 1979, to fully protect their contract rights to extra work and additional income. Accordingly, to the extent that it was necessary to show irreparable harm and the likelihood of success, the Union met that burden (Appendix B, pp. 14a, 15a, 16a).

The First Circuit did not disturb the finding by the District Court that after April 6, 1979 there was no longer a "crew dispatching facility" at Mechanicville since no crew dispatching was done there (Appendix A, p. 6a), or deny that the Union members suffered harm and damage after that date.

The Union claims that the record shows that its members have suffered irreparable harm and the Court has jurisdiction to grant equitable relief pending an Adjustment Board decision. *Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30 (1957) (Appendix B, pp. 14a, 15a, 16a).

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

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United States Court of Appeals For the First Circuit.

No. 80-1754

PETER S. CARBONE *et al.*,
PLAINTIFFS, APPELLEES,
v.
ROBERT W. MESERVE *et al.*,
DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. W. ARTHUR GARRITY, JR., *U.S. District Judge*]

Before
ALDRICH AND WINTER,* *Circuit Judges*,
WYZANSKI,** *District Judge*.

William F. Sheehan, with whom *Sidney Weinberg*, *Ralph J. Moore, Jr.*, *Patrick M. Hanlon*, and *Shea & Gardner* were on brief, for appellants.

James F. Freeley, Jr., with whom *John E. Sheehy*, and *Feeney & Freeley* were on brief, for appellees.

April 10, 1981

ALDRICH, *Senior Circuit Judge*. On April 6, 1979 the Trustees of Boston and Maine Corporation, Debtor (herein-

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* Of the Fourth Circuit, sitting by designation.

** Of the District of Massachusetts, sitting by designation.

after the railroad) withdrew a complement of crew dispatchers then located at the railroad's Mechanicville, New York terminal. These dispatchers had maintained a "spare board," a sheet that listed openings for irregular assignments, and the employees in line for those openings. The withdrawn dispatchers were consolidated with a dispatching crew in East Deerfield, Massachusetts, thus reducing the total number, at a considerable saving. There they produced a Mechanicville spare board, which was reproduced at Mechanicville by a telecopying device known as Rapifax. Most Mechanicville spare board members live in the vicinity, but three WATS lines were also supplied, enabling employees to reach their crew dispatcher in East Deerfield by telephone, toll free, from their homes, or anywhere in New York or New England. Claiming that this changeover constituted a breach of its collective bargaining agreement, and a "major" dispute, the United Transportation Union[1] instituted the present action and, in due course, obtained a preliminary injunction requiring the railroad to reestablish the crew dispatchers at the Mechanicville terminal. In connection with the railroad's appeal we granted its motion for a stay of the injunction. We now reverse, and order the injunction dissolved.

Spare board members are railroad employees who have no regular crew assignments, or who seek work on their days off. Assignments are made on a rotation basis, with employees who have worked most recently being placed at the bottom of the list, to progress upward as assignments are filled, subject to certain seniority rights. If an employee at the top of the list cannot be reached within a reasonable time he is penalized by being taken off the list for 16 hours and then placed at the

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[1] Plaintiffs are the Chairman, the General Adjustment Committee, and various members. The dispatchers themselves are not members of the union, and are not parties to this action.

bottom. Hence it is important for employees to be kept informed at all times. It also appears that mistakes are made, and that employees must be able to make inquiries and see to it, if there are mistakes, that they are corrected.

The basis for this case begins with the railroad's letter of February 11, 1959, written as the result of a settlement of a "major" dispute,[2] containing the following.

> "*ITEM 21*
>
> "In disposition of this item, it is understood Crew Dispatchers will not be withdrawn from any terminal where employed as of the date of this letter without consultation in advance with the General Chairman. This will not apply to changes in or discontinuance of individual assignments."

By letter dated November 24, 1970, the parties made a further agreement.

> "This refers to the settlement of Item 21 in National Mediation Board Case No. E-172.
>
> "For the future it is understood crew dispatching facilities will not be further merged without prior approval from [the union's General Committee on Adjustment], with the exception of the crew disptaching facilities at Rigby and Westboro, which can be merged at the Carrier's option with the present crew dispatching facilities at Mystic Junction.
>
> "In other words, the crew dispatching facilities on the Boston and Maine property would remain as separate facilities, as follows.

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[2] National Mediation Board Case No. E-172.

Mechanicville
East Deerfield
Passenger Crew Dispatchers at Boston
Mystic Junction Crew Dispatchers."

Following the dispatchers' withdrawal on April 6, 1979, the parties being unable to come to terms, the union brought this suit, and on March 5, 1980, at the conclusion of a hearing, the court announced its intention from the bench to grant the injunction.[3] The railroad moved for reconsideration, and that it be allowed to substitute a video spare board to meet certain criticisms that had been advanced against the telecopier. This motion was denied, and in due course the preliminary injunction was entered.

The initial, and dispositive, question is jurisdictional. The Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, divides disputes into two classes. A "major" dispute relates to the formation or modification of the collective agreement — "the acquisition of rights for the future," *Elgin, J. & E. Ry.* v. *Burley*, 1945, 325 U.S. 711, 723 — and falls under section 6 of the Act. 45 U.S.C. § 156; *see generally Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 1969, 394 U.S. 369, 378. A district court may enjoin either party from altering the status quo during the course of the proceedings, with no showing of irreparable harm. *Detroit & Toledo Shore Line RR.* v. *United Transportation Union*, 1969, 396 U.S. 142; *United Transportation Union* v. *Burlington Northern, Inc.*, 8 Cir., 1972, 458 F.2d 354, 357.

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[3] The actual order was to be subject to a hearing as to the amount of the bond. The court subsequently set the admittedly "nominal" figure of $1,000 because of the union's lack of funds. Our stay of the injunction and decision herein moot the railroad's appeal on this issue.

A "minor" dispute, on the other hand, contemplates and existing agreement, and relates "to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case." *Elgin, J. & E. Ry.*, ante, 325 U.S. at 723. Such are entrusted exclusively to arbitration by the National Railroad Adjustment Board at the option of either party, or by system, group or regional board with the consent of both. 45 U.S.C. § 153. No injunction may issue without the traditional showing of irreparable harm. *Order of Railway Conductors* v. *Pitney*, 1946, 326 U.S. 561, 567; *United Transportation Union* v. *Burlington Northern, Inc.*, ante, 458 F.2d at 357.

The question, accordingly, is whether the withdrawal of the Mechanicville dispatchers was, as the union contends, a "unilateral action . . . without any basis in the contract," or, as the railroad asserts, an action warranted by the contract. If it is even "arguable" that it was the latter, *see REA Express, Inc.* v. *Brotherhood of Railway, Airline etc. Employees*, 5 Cir., 1972, 459 F.2d 226, 231, *cert. denied*, 409 U.S. 892, it is a "minor" dispute.

> "If the railroad took action which it admitted was not in conformity with the existing agreement there would be no question that a 'major dispute' was involved; and the same result necessarily obtains where the railroad's claimed justification is without any reasonable basis in the contract. But we think that, where the railroad asserts a defense based on the terms of the existing collective bargaining agreement, the controversy may not be termed a 'major' dispute unless the claimed defense is so obviously insubstantial as to warrant the inference that it is raised with intent to circumvent the procedures prescribed by § 6 for alteration of existing agreements." *Airlines Stewards & Stewardesses Ass'n* v. *Caribbean Atlan-*

> *tic Airlines, Inc.*, 1 Cir., 1969, 412 F.2d 289, 291 (citation omitted), quoting *Southern Ry.* v. *Brotherhood of Locomotive Firemen*, D.C. Cir., 1967, 384 F.2d 323, 327.

The initial difficulty, as it later conceded, was that the court made its March 5 ruling without reference to the *Airlines Stewards* limitation on its power of resolution. The railroad contended that whereas the 1959 agreement spoke in terms of withdrawal of "Crew Dispatchers" while the 1970 agreement referred to the merger of "crew dispatching facilities" and the maintenance of a separate "facility" at Mechanicville, the difference in terms signified a difference in meaning. The court's response, in part, relied on its conclusion that the 1959 agreement's provision for "consultation" (only) was of no value to the union. This, however, was a provision that was bargained for; it was not for the court to assume expertise and declare it worthless.

Although at a later date the court recognized the proper standard, we consider that it continued to violate it when it failed to attribute any consequences to the changes in terminology between the 1959 and the 1970 agreements. It said,

> "Put quite simply, there is no longer a 'crew dispatching facility' at Mechanicville since no crew dispatching is done there . . . . The 'dispatching' is in fact done at East Deerfield . . . ."

We think it at least arguable that the 1970 substitution of "facilities" for "dispatchers" was a liberalization in return for the union's receiving a right of approval rather than, as under the 1959 agreement, of consultation, only, prior to any merger.

Furthermore, the record indicates that the union's real concern was ready ("facile") access to information, and not the physical location of the individuals who generated it.

This would be the end of the matter, but for the union's complaint as to the facility's defects. It is true that an operation might be so totally deficient that it could not be described as a facility at all. The union's evidence showed certain inefficiencies and inadequacies in the operation of the Rapifax, and that there were delays and the employees were not always well served by the WATS lines. With respect to the former, the railroad offered to substitute a video device which would keep the information more current, and more legible. The union expressed dissatisfaction, and its position was upheld by the court.

We have two comments. The first is that mere operational defects, as distinguished from deliberate nonfeasance, do not indicate an "intent to circumvent the procedures prescribed by § 6 for alteration of existing agreements." *Airlines Stewards*, ante. The second is that operational defects normally are remediable as time goes on. The union's refusal even to give the railroad an opportunity to make improvements is inconsistent with what we consider to be the entire intendment of the Act, namely, to have matters resolved at the adjustment level if possible. We view the defects in the facility in the same light as we regard the larger issue, the physical location of the dispatchers. *Accord, United Transportation Union* v. *Baker*, 7 Cir., 1974, 499 F.2d 727, 731, *cert. denied*, 419 U.S. 839, where the court criticized the court in *United Transportation Union* v. *Penn Central Co.*, 6 Cir., 1971, 443 F.2d 131, *cert. denied*, 404 U.S. 938 for making such factual determinations as being contrary to the rule we had embraced in *Airlines Stewards*. Courts should be the last, rather than the first, resort, particularly so if circumventing the Adjustment Board can bring preliminary relief at little attendant risk. *See* n.3, ante.

In sum, there may be a violation of the contract, but this is a question of interpretation, and as such is outside of our jurisdiction. Were it otherwise, "the arbitration machinery mandated by the Railway Labor Act [would] be dealt a crippling blow." *Airlines Stewards*, ante, 412 F.2d at 291.

One other point merits comment. The railroad, by a section 6 notice dated October 6, 1978, placed in mediation the following item (among many).

> "Establish a rule for:
>
> Eliminating any rule or agreement which imposes any restriction on consolidation of crew dispatching facilities."

The union contends, and the court found, that this item was withdrawn on August 17, 1979, after removal of the Mechanicville dispatchers.[4] We can see no adverse inference to be drawn from this. Whatever may be the case when the issues are the same, *see United Transportation Union* v. *Illinois Terminal Ry.*, 7 Cir., 1972, 471 F.2d 375, 377-79, elimination of the rule, and determination of what is permissible thereunder, are two quite different matters. *Cf. Hilbert* v. *Pennsylvania RR.*, 7 Cir., 1961, 290 F.2d 881, 885, *cert. denied*, 368 U.S. 900.

Reversed and remanded for vacation of the injunction.

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[4] The railroad disputes this. In fact, we find it irrelevant, but we observe for the future that a matter so easily verifiable as this should have been cleared up well before the case reached us.

Appendix B.

Peter CARBONE et al., Plaintiffs,
v.
Robert W. MESERVE et al., Defendants.
Civ. A. No. 79-2386-G.

United States District Court,
D. Massachusetts.

Oct. 17, 1980.

In action brought by a transportation union to enjoin a railroad from unilaterally merging crew-dispatching facilities, the District Court, Garrity, J., held that under evidence, employer had merged crew-dispatching facilities in violation of agreement and had thus made unilateral change in working conditions, prohibited by Railway Labor Act, and such contested action of employer involved major dispute as to which court would issue injunction to restore status quo, employer's installation of "rapifax" machine being altogether inadequate substitute for presence of crew dispatchers and official T-147 spare board.

Preliminary injunctive relief granted.

Labor Relations 416.4

Under evidence, employer had merged crew-dispatching facilities in violation of agreement and had thus made unilateral change in working conditions prohibited by Railway Labor Act, and such contested action of employer involved major dispute as to which court would issue injunction to restore status quo, employer's installation of "rapifax" machine

being altogether inadequate substitute for presence of crew dispatchers and official T-147 spare board. Railway Labor Act, §§ 2, subds. 1, 2, 7, 6, 45 U.S.C.A. §§ 152, subds. 1, 2, 7, 156.

James F. Freeley, Jr., Feeney & Freeley, Boston, Mass., for plaintiffs.

Sidney Weinberg, Boston, Mass., for defendants.

FURTHER FINDINGS AND CONCLUSIONS SUPPORTING ORDER FOR PRELIMINARY INJUNCTION

GARRITY, District Judge.

This action was brought by the plaintiff United Transportation Union (UTU) to enjoin the defendant Boston and Main Corporation (B & M) from unilaterally merging its crew dispatching facility at Mechanicville, New York, into the facility of East Deerfield, Massachusetts, in violation of the Railway Labor Act, 45 U.S.C. § 152 Seventh (1976). Plaintiff's application for a temporary restraining order was denied on November 30, 1979. Hearings were held on plaintiff's motion for a preliminary injunction on February 29 and March 5, 1980, after which the court found that the defendant, B & M, had changed the rules and working conditions of its employees as embodied in an agreement dated November 24, 1970, without resort to the procedures mandated by 45 U.S.C. § 156 (1976). The court's order entered March 5 was predicated on its find-

ings and conclusions stated in open court at the conclusion of the hearing, including a ruling that a "major dispute" existed under the Railway Labor Act. The court denied B & M's motion to dismiss, and ordered a preliminary injunction to restore the status quo at the Mechanicville facility as it functioned on April 6, 1979. The injunction was conditioned on the parties' submission of written briefs and affidavits on the issue of the necessity and amount of bond under Rule 65(c), Fed.R.Civ.P. On April 4, 1980 the court ordered that plaintiffs post bond in the amount of $1,000; a bond in this amount was filed on July 10, and approved July 11, 1980. We withheld entry of the order, however, pending a further hearing on September 23, 1980 of defendants' motions to amend the decree and to reconsider our denial of their motion to dismiss. We now reaffirm our previous rulings and, for the reasons set forth below, order entry of a preliminary injunction in favor of plaintiffs, and deny defendants' renewed motion to dismiss and motion to amend the injunctive decree.

The present dispute arose out of B & M's action on April 6, 1979, removing the crew dispatchers and "crew board" from the railroad's facility at Mechanicville, New York, to the facility at East Deerfield, Massachusetts. UTU claims that this action of B & M was taken in plain violation of longstanding agreements between the parties. Specifically an agreement between UTU and B & M was reached in settlement of a "major dispute" before the National Mediation Board, Case No. E-172, on February 11, 1959, concerning the maintenance of crew dispatching facilities at particular work locations, identified as "Item 21." It provided:

> *Item 21.* In disposition of this item, it is understood Crew Dispatchers will not be withdrawn from any terminal where employed as of the date of this letter without consultation in advance with the General Chairman.

This will not apply to changes in or discontinuance of individual assignments.

Eleven years later, in a letter of agreement dated November 24, 1970, the former General Chairman of the UTU, J. L. Scanlan, and the former Assistant Director-Labor Relations for B & M, D. F. Ellingwood, modified Item 21 as follows:

This refers to the settlement of Item 21 in National Mediation Board Case Number E-172.

For the future it is understood crew dispatching facilities will not be further merged without prior approval from this Committee, with the exception of the crew dispatching facilities at Rigby and Westboro, which can be merged at the Carrier's option with the present crew dispatching facilities at Mystic Junction.

In other words, the crew dispatching facilities on the Boston and Maine property would remain as separate facilities, as follows:

Mechanicville
East Deerfield
Passenger Crew Dispatchers at Boston
Mystic Junction Crew Dispatchers

Subsequent to this agreement, B & M merged the Westboro crew dispatchers with the East Deerfield crew dispatchers and likewise Rigby with Mystic Junction in Somerville, Massachusetts, in accordance with the carrier's option under this agreement.

On December 3, 1976 B & M notified the UTU by letter of its desire to effect a "Consolidation and Combining of Crew Dispatchers Positions and Work" under the informal settlement procedures outlined in the Act, 45 U.S.C. § 152 First and Second (1976), and recognized that Item 21 and the November 24, 1970 agreement controlled the matter. UTU responded on December 10 that any proposed merger of crew dispatchers created a major dispute under Section 6 of the Act. B & M replied by letter dated December 16, 1976 that "If we are still unsuccessful in our attempt to secure your Organization's approval of this merger, we, of course, may have to resort to the provisions of Section 6 of the Act or some other legal avenue to effect the desired changes."

On January 3, 1977 the UTU sent B & M, as well as other railroads, a Section 6 notice of intended changes in the existing agreement affecting rates of pay, rules and working conditions. As part of the general discussion that ensued from the UTU's Section 6 notice, B & M countered with its own Section 6 notice on October 3, 1978, and attached its own proposed changes in the existing agreement. One of those changes was "Attachment A-11", which proposed to: "Establish a rule to provide for: Eliminating any rule or agreement which imposes any restriction on consolidating of crew dispatching facilities." Discussion of the proposed changes, including the proposed elimination of the November 24, 1970 agreement, continued between B & M and UTU through March of 1979.

On April 6, 1979, however, B & M moved the crew dispatchers from Mechanicville, New York, to East Deerfield without the approval of the UTU. Four crew dispatchers had been employed at the Mechanicville facility on a 24-hour basis. These dispatchers assigned work to employees of B & M residing in the Mechanicville area in accordance with rules regarding seniority rights and other standards. The crew dispatchers also serviced the "spare board" for the Mechanicville

area, T-147, which lists jobs and job vacancies on an up-to-the-minute basis. The current spare board at Mechanicville was always available for inspection by UTU Local 470 members, as well as the spare boards for the day before and the next day. The local UTU members constantly relied upon a personal relationship with the dispatchers and upon the currency and accuracy of the spare board to ascertain the availability of work, to protect their seniority rights, and to avoid penalties for the failure to accept a work assignment within one hour of the scheduled job.

In place of the crew dispatchers removed from Mechanicville, the B & M opened a toll free telephone number to the crew dispatching facility at East Deerfield, where the T-147 spare board for Mechanicville had been relocated. About one week after April 6, B & M installed a "Rapifax" telecopying machine at Mechanicville. This machine duplicated the actual handwriting of the crew dispatchers at East Deerfield, and was scheduled to reproduce the spare board at Mechanicville three to four times a day. However, numerous problems have arisen under the new system installed by the B & M, including frequent difficulty reaching the crew dispatchers in East Deerfield, illegibility of the rapifax copies of the spare board, and mechanical breakdowns of the rapifax machine.

B & M and UTU continued to discuss the Attachment A-11 proposal after B & M's action of April 6. At the union's request, the negotiations concerning the mutual Section 6 notices were referred to the National Mediation Board in June of 1979, and assigned Case No. A-10467. Several discussions were held in August 1979 in the presence of the federal mediators, without resolution of outstanding issues. B & M withdrew the merger proposal, Attachment A-11, from the Mediation Board on August 27, 1979. The UTU was not told of B & M's withdrawal until Mediator B. Meredith orally informed the union on September 25, 1979. The next day the UTU

Local 470 union members at Mechanicville took a strike vote to refrain from work until B & M returned the crew dispatchers to Mechanicville. Tabulation of the union's votes was completed in early October, reflecting 17 in favor, 1 opposed, and 1 abstention. The UTU advised B & M of its position that they would stop work unless the dispatchers were returned by Saturday, October 27, 1979. Throughout, the UTU had addressed numerous complaints to the B & M. The UTU filed a complaint in this court for a temporary restraining order and preliminary injunction on November 30, 1979.

On the basis of these facts, and the testimony heard February 29 and March 5, 1980, we find that the action of the railroad involves a change of rules and working conditions in violation of 45 U.S.C. §§ 152 Seventh and 156 (1976). Hence, B & M's contested action involves a major dispute, since there is no doubt that the existing agreement of November 24, 1970 precludes the merger of the Mechanicville and East Deerfield crew dispatching facilities. *See Elgin, Joliet & E. Ry. Co.* v. *Burley*, 325 U.S. 711, 723, 65 S.Ct. 1282, 1290, 89 L.Ed. 1886 (1945); *Airlines Stewards & Stewardesses Ass'n* v. *Caribbean Atlantic Airlines*, 1 Cir., 1969, 412 F.2d 289, 291. We explicitly find that the railroad's "contractual defense [is] so obviously insubstantial as to be an attempt to circumvent § 6 of the Railway Labor Act." *Airline Stewards & Stewardesses Ass'n, supra* at 291. First, in no way can it be understood that B & M's transfer of crew dispatchers and the T-147 spare board to East Deerfield from Mechanicville is anything but a merger of those facilities in violation of the November 24, 1970 agreement. Put quite simply, there is no longer a "crew dispatching facility" at Mechanicville since no crew dispatching is done there. Though a "rapifax" machine was installed at Mechanicville, it is often outdated, illegible, inoperable and an altogether inadequate substitute for the presence of the crew dispatchers and the official T-147 spare board. The "dis-

patching" is in fact done at East Deerfield, some 100 miles away from Mechanicville, where the Local 470 union members must call to discover the availability of vacancies and respond to assignments. Failure to keep in constant and accurate contact with the crew dispatchers can result in penalties to the union members by missing an available assignment and consequently being removed from the list of available employees for a period of 16 hours before being returned to the bottom of the waiting list. As in *United Transportation Union* v. *Penn. Central Co.*, 6 Cir., 1971, 443 F.2d 131, the railroad's instalment of the "rapifax" machine is a unilateral change in working conditions prohibited by the Railway Labor Act.

Second, we find that the B & M's contractual defense that a "crew dispatching facility" remains in Mechanicville is simply an attempt to circumvent the Section 6 procedures required by the Act. The issue between these parties of the merger of crew dispatching facilities has been historically a subject of negotiation before the National Mediation Board. In fact, the merger issue was before the Mediation Board in this case until B & M withdrew Attachment A-11 on August 27, 1979, after it had unilaterally effected the merger of the Mechanicville and East Deerfield facilities on April 6.

In view of the foregoing considerations, we are compelled to issue an injunction to restore the *status quo* of April 6, 1979 at the Mechanicville facility until the settlement procedures of 45 U.S.C. § 156 (1976) have been complied with. *Detroit & Toledo Shore Line Railroad Co.* v. *United Transportation Union*, 396 U.S. 142, 90 S.Ct. 294, 24 L.Ed.2d 325 (1969); *UTU* v. *Burlington Northern, Inc.*, 8 Cir., 1972, 458 F.2d 354, 357. The defendants' motions for reconsideration of dismissal and amendment of the preliminary injunction are denied.

Appendix C.

45 U.S.C. §§ 152 Seventh and 156 (Railway Labor Act).

§ 512. General duties

. . . . . .

Seventh. Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

. . . . . .

§ 156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.